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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 964

RANDOLPH ERWIN ROSENSON
Petitioner,

versus

UNITED STATES OF AMERICA
Respondent.

Petition for Certiorari to Review Judgment of Fifth Circuit Court of Appeals in No. 26,976, "Randolph Erwin Rosenson versus United States of America."

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SUPREME COURT OF THE UNITED STATES
October Term, 1969

No.

RANDOLPH ERWIN ROSENSON
Petitioner,

versus

UNITED STATES OF AMERICA
Respondent.

Petition for Certiorari to Review Judgment of Fifth Circuit Court of Appeals in No. 26,976, "Randolph Erwin Rosenson versus United States of America."

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Randolph Erwin Rosenson, prays that a writ of certiorari issue to the United States Court of Appeals for Fifth Circuit to review the judgment, opinion and decree of said Court rendered on October 27, 1969 and as to which rehearing was denied on November 18, 1969.

CITATIONS TO THE OPINION BELOW

The opinion of the District Court is reported in 291 F.S. 874. The Per Curiam opinion of the Fifth Circuit is as yet unreported. Both opinions appear in the Appendices attached hereto.

JURISDICTIONAL STATEMENT

Petitioner was convicted under one count of violation of 18 U.S.C. 1407 relative to failure by one convicted under a

narcotic or marijuana law to register upon leaving or reentering the country and was sentenced to one year imprisonment. A second count was dismissed as being unconstitutional under the doctrine of Marchetti-Grosso-Haynes, as set forth in argument. This conviction was affirmed by the Fifth Circuit in an opinion rendered on October 27, 1969 and rehearing was denied on November 18, 1969.

The statutory provision relied upon as conferring jurisdiction upon this Court is 28 U.S.C. 125 4(1).

QUESTIONS PRESENTED

1. Whether a conviction under the general Louisiana "attempt" statute pertaining to attempts to commit any and all crimes, when related to an attempt to possess marijuana, is a conviction under a "narcotic or marijuana law" of the state of Louisiana?

2. Whether the requirements of 18 U.S.C. 1407, relative to the requirement of registering upon leaving the country, can be deemed valid if the requirement of the same statute, as to registry upon reentry is unconstitutional as violating Fifth Amendment privilegeagainst self-incrimination?

3. Under the rationale of Marchetti-Grosso-Haynes as to the scope of the constitutional privilege against self-incrimination, would registry upon leaving the country, by one convicted of a narcotics violation, constitute evidence or a lead to evidence against him where the trip out of the country was a violation of parole or probation conditions as to travel which would subject him to criminal penalties by the State authorities?

STATUTES INVOLVED

1. Title 18 U.S.C. Sec. 1407

2. LSA-14 R.S.: 27 (The Louisiana general "attempt statute)

The Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

In January of 1965 petitioner, Rosenson, pleaded guilty to "attempted possession" of eleven marijuana cigarettes under the Louisiana general "attempt" statute, LSA-R.S.: 14:27. This statute applies to any attempt to commit any crime under the laws of Louisiana, providing lesser penalties, as hereinafter discussed. This general attempt statute is not even included in the same volume of Louisiana statutes covering narcotics or marijuana offenses, as noted below. As a result of this guilty plea he received a suspended sentence and was placed on probation. His probation officer was one Dee Hammett who covered the area of petitioner's domicile in Mississippi (R. 133,134). The probationery status of petitioner at the time of his failure to register upon leaving the country becomes important as bearing upon the issue of self-incrimination under the rationale of Marchetti-Grosso-Haynes, discussed in argument below.

Petitioner has a thriving business ivnolving the import of birds and animals for pet shops and maintains a petshop and animal compound in Mississippi. (R. 152, 153) He also

He also maintains a home in Florida and travels extensively around the United States in connection with his business and makes frequent trips to Mexico.

It was admitted by the Government that petitioner had, after his state conviction and suspended sentence, served as an informer, assisting state and Federal narcotics agents. (R. 44, 45)

An attempt was made to show that the instant prosecution was initiated when he refused to cooperate as much as desired in the informer role, but his inquiry was cut short by the Court as immaterial. (R. 187, 188)

On December 28, 1965, less than a year after his guilty plea to the "attempted" possession of 11 marijuana cigarettes, petitioner made a plane trip via Pan American Airways to Merida, Mexico, for the purpose of obtaining some birds for a business man in Mississippi, a Mr. Epps. The latter paid all expenses and petitioners attorney, Mr. Yarborough, accompanied him. (R. 154, 155)

Petitioner testified that since he had never been sentenced to any jail term (having received only a suspended sentence) he did not consider himself as having been "convicted" under any marijuana law. Moreover, he testified that he did not see any of the signs at the airport relative to the necessity of registering and was not advised of any sueh necessity upon departing, either by any person in authority or by his Mississippi attorney (R. 160, 161)

On returning to New Orleans he was subjected to a thorough and humiliating search at the airport which

involved a rectal probe. Rosenson testified that he was confused and humiliated during the search and questioning. He did not recall the details of what he told the officials who were questioning him as they peered up his rectal cavity, but did not recall denying any prior conviction for narcotics or marijuana. (R.160, 161)

The search consumed some 20 minutes and no contraband of any kind was found. (R. 121)

Petitioner was tried without a jury and convicted on two counts of violating Title 18 U.S.C. relative to failure to register with Customs officials upon leaving and upon reentering the country. Pending disposal of post-conviction motions, court rendered the far reaching decisions of Marchetti, Haynes and Grosso and the trial Judge, in the light of said decisions, set aside the conviction upon the count based upon failure to register upon returning to the country. He held the statute violated petitioners constitutional rights under Marchetti, Grosso and Haynes, but treated the requirement of failing to register upon leaving as separable and not violative of the rights of petitioner as to self-incrimination. (See Opinion. District Court Appendix).

REASONS FOR GRANTING THE WRIT

1. CONVICTION UNDER THE LOUISIANA GENERAL ATTEMPT STATUTE IS NOT A CONVICTION UNDER "A MARIJUANA OR NARCOTICS LAW" IN CONTEMPLATION OF TITLE 18 U.S.C. 1407.

The Federal statute under which petitioner was prosecuted here, Title 18, U.S.C. 1407, in the pertinent portion, applies only to those:

"***convicted of a violation of any of the narcotic or marijuana laws of the United States, or of any State thereof, the penalty for which is imprisonment for more than one year" etc.

The question, therefore, is whether or not conviction under the Louisiana general attempt statute, applicable to all manner of crimes, constitutes a "conviction" contemplated by the above Federal statute.

In disposing of this point in the post trial motions the Court relied heavily upon the general language found in ADAMS V. UNITED STATES, 299 F. 2d 327 (9th Cir. 1962). In so doing, however, he overlooked the factors considered in Elater 1963 decision by the same Court in HASEROT V. UNITED STATES, 9th Cir. 321 F. 2d 582.

In the Haserot case the Ninth Circuit was called upon to decide whether or not a certain California statute was "a narcotic or marijuana law" within the meaning of the instant Federal Statute. In holding that the California Statute did fall within the scope of the instant Federal registration statute the Court considered the following factors:

(a) That the state act was found in the California Health and Safety Code under Division X, entitled "Narcotics" and under another chapter entitled "Illegal Narcotics".

(b) It was listed among the prior narcotics offenses precluding probation in the event of subsequent conviction;

(c) It carried an increased potential punishment for a second offense.

None of the above factors will be found quo ad the Louisiana general attempt statute. First of all, it is found in an entirely different volume from the narcotics statute, being listed as R.S. 14:27 under the title "Inchoate offenses". It covers attempts to commit any crime of any nature.

The penalty for attempts is substantially less than that provided for the actual offense. In one category the penalty is set at half the penalty provided for the completed offense itself.

In rejecting the argument of the defendant on this point the trial Judge noted two Louisiana cases holding that a verdict of attempted possession of marijuana was responsive to a charge of possession of marijuana. It is submitted, however, that this test of responsiveness is not a fair test as to the general connotation of a term describing a category of crimes.

The responsiveness of verdicts is a rather arbitrary matter, regulated in Louisiana solely by statute, Article 814 of the Code of Criminal Procedure. For example, under the crime of "theft" we find that one of the responsive verdicts is "Guilty" of unauthorized use of movables". This crime is committed where there is no intention to keep the object of the theft. But, one using the term "theft" in a general

statute would scarcely be deemed to have contemplated an offense which did not connote a "keeping".

Significantly, the terms of the Louisiana attempt statute is so broad that the fulfillment of its requirements (as applied to an "attempt" to possess marijuana) might bear little resemblance to the substantive offense of possessing marijuana. For the statute (R.S. 14:27) provides in its opening paragraph the definition of an "attempt" in the following language: (See Appendix C)

Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended etc. (Emphasis added)

Under the above broad definition of an attempt, a man who simply made a phone call in an effort to locate a "pusher" who might supply him would clearly be performing an act" tending directly toward the accomplishing of his object". Yet it seems extremely doubtful that Congress intended that such a man (though he changed his mind and never pursued the eleven marijuana cigarettes past the first phone call wherein he sought to locate a pusher through an intermediary) would be required to register as a narcotics offender when leaving or reentering the country.

2. THE REGISTRATION STATUTE, TITLE 18 U.S.C. 1407 IS INDIVISIBLE.

The Fifth Circuit adopted the opinion of the trial Judge in its Per Curiam (see Appendix). We must therefore look to

the opinion of the trial Judge for the rationale upon which this decision stands.

As will appear by the opinion of Judge Heebe (Appendix) he applied the rationale of the recent "self incrimination trilogy", Marchetti, Grosso and Haynes, to the count involving failure to register upon reentering the country and found the statute unconstitutional quo ad failure to so register. He refused to do so, however, as to that portion of the statute affecting failure to register upon leaving the country.

We submit that this was not consistent with the rationale of this Court in HAYNES V. UNITED STATES, 390 U.S. 85, 19 L. ed 2d 923, 88 S. Ct. 722, wherein Your Honors, dealing with a comparable situation involving the registration of firearms, declared: (at page 932 of 19 L. ed 2d)

"Nonetheless, the correlation between obligations to register and violations can only be regarded as exceedingly high, and a prospective registrant realistically can expect that registration will substantially increase the likelihood of his prosecution."

Applied to the instant situation it can certainly be said that registry upon leaving the country would "substantially increase the likelihood" of prosecution for failure to register upon return. For, although there was nothing furtive about the trip (because petitioner and his attorney admittedly possessed tickets in their right names and flew on a regularly scheduled commercial airline) the registry as a convicted marijuana offender upon leaving would serve a double purpose in a prosecution for failure to register upon reentry because:

convicted marijuana offender upon leaving would serve a double purpose in a prosecution for failure to register upon reentry because:

(a) It would amount to a formal admission of status, i.e. a formal admission that petitioner had been convicted under "a marijuana law" (a point extremely dubious as noted above) and (b) Such registration would alert the customs officials so as to enable them to lie in wait for petitioner upon his return.

Certainly, this latter aspect forms a "link" in the evidentiary chain within the rationale of Marchetti-Grosso and Haynes.

Finally, in conclusion upon this point, it is difficult to see how a portion of Title 18 1408 can be invalidated in part as being unconstitutional while sustaining so closely related a portion as we have here.

The requirements as to registry upon leaving and returning are both contained in the same paragraph, i.e. 1407 (a). THE CERTIFICATE TO BE OBTAINED UPON LEAVING IS THE SAME CERTIFICATE TO BE SURRENDERED UPON RETURNING. The whole scheme of registration is part of the same "package". We submit, therefore that any Solomon-like surgery, such as that attempted by the trial Judge in an effort to rationalize his cutting of the infant in half, must fail for lack of logical oxygen. This baby is doomed, unless this Court will tolerate a new race of two-headed semantic monstrosities in the family of statutes.

3. REGISTRATION AS SELF-INCRIMINATION QUO AD PAROLE OR PROBATION VIOLATION.

At the trial of this case in the District Court it was urged that, in addition to the other aspects of self-incrimination noted above, registration by petitioner upon leaving for Mexico would have incriminated him by reason of his probationary status in Mississippi. This probationary status is described at several points in the record, as we will show.

The trial Judge, however, in disposing of this aspect of alleged threatened self-incrimination, had this to say: (See 291 F.S. 877 and Appendix A)

"On oral argument counsel for the defendant made some comments about the possibility of a parole violation in leaving the country but this argument was not developed and his comments were vague and general. It was not established by argument or evidence that the defendant violated the conditions of his parole in leaving the country, and we do not deem it necessary to pass upon such a "willof-the-wisp."

It will be noted that, although the Court refers to the argument as a "will-of-the-wisp", he expressly refrains from making a specific finding of fact either as to: (a) The terms of the parole under which petitioner was operating; or (b) Whether going to Mexico was an actual violation.

The trial Judge, in a rather oblique fashion, states that:

"***we do not deem it necessary to pass upon such a will-of-the-wisp."

There is no room whatever to treat the evidence as to parole violation as vague. It was not extensive but was wholly uncontradicted. Thus, Mr. Dee Hammett, a defense witness, testified: (R. 133)

BY MR. GILL: Mr. Hammett, what is your official position with the State of Mississippi?

A. I am a Mississippi Probation and Parole Officer.

Q. Did you have charge and under your control the case of Randy Rosenson as of January, 1965.

A. Yes.

The Government itself established that Rosenson was not supposed to leave the country because of his parole conditions. Thus the Government asked the same parole officer, Dee Hammett, the following: (R. 136)

BY MR. CONNICK: Mr. Hammett, you said that Rosenson spoke to you about traveling from state to state, is that it?

A. And the reason, -- can I explain it to you?

Q. Well, of course, but first of all, did he talk to you about going from state to state?

A. That is correct, yes.

Q. But he did not ever tell you that he wanted to go to Mexico?

A. He did not."

The foregoing testimony by petitioner's parole officer, we submit, which is absolutely uncontradicted, rather clearly establishes that the terms of petitioner's parole or probation did not permit his leaving the country. Moreover, said testimony makes it equally clear that petitioner never obtained leave to depart from the country.

From this, it follows that, no matter how brief the above argument may be it cannot be brushed aside as a mere "will-of-the-wisp". For, if it was a violation of his State parole or probation terms for petitioner to leave the country, the filing of a certificate upon leaving certainly formed part of the chain of evidence against him quo ad violation of parole conditions.

As to the issue of self-incrimination, it can make no difference under the rationale of Marchetti, Grosso and Haynes that the incrimination related to a State offense rather than a Federal one.

Nor is it any answer to contend that the mere filing of the registration certificate does not indicate of itself commission of the crime of parole violation. The filing of the certificate would itself form a link in the evidentiary chain as contemplated in the earlier case of ALBERTSON V. SACB, 382 U.S. 70, 79, 15 L. Ed 2d 165, 172, 86 S. Ct. 194, where the court stated that "response to any of the forms questions in context might involve petitioner in the admission of a crucial element of a crime."

CONCLUSION

It is respectfully submitted that any one of the foregoing three issues warrants the issuance of certiorari in this case.

Wherefore, petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit in the above case.

G. WRAY GILL, SR.

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CERTIFICATE OF SERVICE

I, Geo. M. Leppert, of counsel for petitioner and a member in good standing of the bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing petition for certiorari has been served upon the Solicitor General of the United States and upon the United States Attorney for the Eastern District of Louisiana, by mailing same, postage prepaid and properly addressed on Dec. , 1969.

Dec. , 1969

Geo. M. Leppert

APPENDIX A—OPINION OF

DISTRICT COURT

Heebe, District Judge:

The fear expressed by Chief Justice Warren in his dissenting opinion in Grosso v. United States, 390 U.S. 62 (1968) at 84, 88 S. Ct. 709, 19 L.Ed. 2d 906 is now a reality, although possibly in a different posture, for we are here asked to upset a conviction on all three counts in an indictment charging the defendant with violating 18 U.S.C. Sec. 1407. The defendant is a citizen of the United States and was convicted of attempted possession of narcotics under La. Stat. Ann. 14:27 (40:962), the penalty for which is imprisonment for more than one year. Count I of the indictment charged the defendant with departing from the United States through New Orleans, a port of departure, without registering with a Customs official. Count II charged the defendant with failing upon reentry to surrender the certificate required to be obtained when leaving the United States. The defendant was tried by the Court without a jury on July 20, 1967, and was found guilty on all three counts on October 11, 1967. Prior to sentencing, which was continued several times, the United States Supreme Court rendered its opinion in Marchetti v. United States, 390 U.S. 39, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968). Grosso v. United States, supra; and Haynes v. United States, 390 U.S. 85, 88 S. Ct. 722, 19 L. Ed. 2d 923 (1968). On the basis of these decisions the defendant filed a "Motion in Arrest of Judgment" and a "Motion for New Trial," both on the ground that the privilege against self-incrimination affords

a complete defense to these charges. An alternative ground for both motions was that attempted possession of narcotics is not one of the narcotic or marijuana laws of the State of Louisiana. The United States objected on the ground that the motions were not timely filed. We dispensed with this objection in a former opinion in which we held that the constitutional argument was a "nonwaivable" defense within the meaning of F.R. Crim. P. 12(b)(1) and that, under the circumstances, it was procedurally proper to raise it at that time under F.R. Crim. P. 12(b)(3). The alternative argument was treated as a claim that the indictment fails to state an offense which was properly raised at that time under F.R. F.R.Crim.P. 12(b)(2). United States v. Rosenson, 291

[1] Turning first to the constitutional argument, we now hold that the rationale of *Marchetti, Grosso,* and *Haynes* require us to vacate the conviction on Counts II and III and to dismiss those counts. The same real and substantial hazards of self-incrimination which existed in those cases are manifest in the circumstances of this case. In order to comply with the provisions requiring registration and surrender of the certificate upon reentry, the defendant, in effect, would be admitting that he had violated the law upon departure must be surrender. 19 C.F.R. Sec. 23.9a. If he is unable to surrender the certificate for any reason, he may still register upon reentry under an alternative procedure, but we do not believe that this eliminates, or even lessens, the hazard of self-incrimination because here, as in *Marchetti, Grosso,* and *Haynes,* the statutory obligations are directed exclusively to individuals inherently suspect of criminal activities. This is obvious from the fact that the statute applies only to those persons who have been previously

convicted of a narcotics or marijuana violation. Thus, when a person attempts to register upon reentry without having the certificate required to be obtained upon departure, this must surely wave the incriminating red flag of guilt in the face of the prosecuting officials. This is true in spite of the fact that it is possible that such a person did comply with the requirements of the law upon departure for such instances, as in *Haynes*, must be deemed "uncommon."

[2] With respect to Count I, however, the record does not support a finding that the registration requirements upon departure created a real and substantial hazard of self-incrimination. The reason for this is not that such a person is not inherently suspect of criminal activities at that time, but because the record before us fails to reflect, not only that there is *any* possibility that merely by registering with the Customs officials the defendant opens himself to a criminal prosecution. The defendant has completely failed to show how, by registering upon departure, he renders himself more susceptible to a criminal prosecution and conviction. Nor is it clear from the face of Count I that registration is an admission of guilt as it is from the face of Counts II and III. On oral argument counsel for the defendant made some comments about the possibility of a parole violation in leaving the country but this argument was not developed and his comments were vague and general. It was not established by argument or evidence that the defendant violated the conditions of his parole in leaving the country, and we do not deem it necessary to pass upon such a "will-of-the-wisp."

[3] In our former opinion in this matter, United States v. Rosenson, supra, we did not hold, as contended by the

defendant, that *Marchetti, Grosso* and *Haynes* applied retroactively to this prosecution. We merely held that procedurally it was a proper time to *raise* the argument and left for decision at this time the substantive question of whether the rationale of those cases could be applied retroactively to this case. In light of the opinions which have been rendered subsequent to the Supreme Court decisions, there is no doubt that the principles announced in those cases are applicable to persons tried and convicted prior thereto, even though the privilege against self-incrimination was not asserted at the time of the trial. United States v. Manfredonia, 391 F. 2d 229 (2d Cir. 1968); Greenwood v. United States, 392 F. 2d 558 (4th Cir. 1968); United States v. Lookretis, 398 F. 2d 64 (7th Cir. 1968); Harris v. United States, 393 F. 2d 342 (8th Cir. 1968); Isaac v. United States, 293 F. Supp. 1096 (D.S.C. 1968). This was made clear by *Grosso* in which the defendant failed to argue, even in the Supreme Court, that the privilege against self-incrimination was a defense to the charges against him of willful failure to pay the special occupational tax imposed by 26 U.S.C. Sec. 4411. Yet the conviction on these charges was also reversed.

[4–8] There remains for consideration only the fact that the defendant took the stand and testified in this case. We must decide whether this fact constituted a waiver and therefore put the defendant outside the protection of the privilege. Notwithstanding Leary v. United States, 392 F. 2d 220 (5th Cir. 1968), we hold that this did not constitute a knowing and intelligent waiver of the privilege against self-incrimination. Our reasoning is simple. Ordinarily the failure to assert this as a defense at the trial would constitute a waiver of that constitutional right. Likewise, the fact that

the defendant testified as to the facts of all three offenses would ordinarily constitute a waiver of that constitutional right. However, the cases cited above hold, and we also hold that the failure to assert it as a defense at the trial is not a waiver because neither the defendant nor his attorneys are required to anticipate rulings of the Supreme Court which upset well-entrenched rules, and therefore it does not satisfy the requirement established by Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), and its progeny that to waive a constitutional right, the defendant must *knowingly* and intelligently waive that right. Unless the defendant is fully aware of a constitutional right, he cannot effectively waive that right. Thus, the failure to assert the privilege against self-incrimination by way of defense at the time of the trial does not constitute a waiver of that constitutional right because the right was unknown. The only difference between the failure to assert the privilege as a defense and the fact that the defendant testified is that the latter involves affirmative action on the part of the defendant while the former involves passive omission to act. This difference, however, does not and cannot alter the requirement that to waive a constitutional right the defendant must be fully aware of that right. Consequently, the fact that the defendant testified at his trial is no more a waiver of the privilege against self-incrimination than when he failed to assert it as a defense. We do not read the *per curiam* opinion in *Leary* as being contrary to our decision for in that case, in spite of some of the language contained therein, the Fifth Circuit apparently held that the reasoning of *Marchetti*, *Grosso*, and *Haynes* was not applicable to the facts of that case because the statute in *Leary*, unlike the statute in this case, did not clearly require an admission of guilt.

[9] While the motion before us is not to be considered as a motion for a new trial, we note that under the proper circumstances a new trial is a possible result. In this case, however, we do not feel that a new trial is warranted or would serve any useful purpose. This case was tried by the Court without a jury. The issues were simple, and the evidence thereon in no way prejudiced the trial of the de- evidence was clear and direct. The presence of Counts II and III and the introduction of evidence thereon in no way prejudiced the trial of the defendant as Count I. Consequently, the dismissal of Counts II and III and the convictions thereon is, under the circumstances, all the relief to which the defendant is entitled.

[10] We now turn to the alternative argument advanced by the defendant that attempted possession of narcotics is not one of the narcotic or marijuana laws of the State of Louisiana and that therefore the indictment fails to state an offense. The defendant premises his argument on the fact that Louisiana has adopted the Uniform Narcotic Drug Act which is embodied in La.Stat. Ann. 40:961—40:984 and that he was not convicted of a violation of that Act, which does not make attempted possession of narcotics a crime, but rather was convicted under the general criminal statute, La.Stat.Ann. 14:27, which makes it a crime to attempt to commit a crime. fail for it would require us to engraft subtle distinctions upon the law unwarranted by the clear language of 18 U.S.C. Sec. 1407; Adams v. United States, 299 F. 2d 327 (9th Cir. 1962). Therefore, the fact that the attempt provision is found in a different part of the statute books has no relevance. The relevant inquire is not to determine where the crime is found in the books but rather to determine what the

crime is. Here the crime of which the defendant was convicted is attempted possession of narcotics. That should answer the question.

While we think the matter is free from complexity and is as simple as stated above, we will go further and meet the defendant's argument hear on. The crux of defendant's argument is that all of the narcotic and marijuana laws of the State of Louisiana are found in La. Stat. Ann. 40:961—40:984. It is true that these provisions do not make attempted possession of narcotics a crime. However, without the crime of possession of narcotics there could be no crime of attempted possession of narcotics. Therefore, to the extent that La. Stat. Ann. 14:27 makes attempted possession of narcotics a crime, we believe that it must be considered part and parcel with the provisions of the Uniform Narcotic Drug Act and, as such, one of the narcotic laws of Louisiana. Our conclusion that the crime of attempted possession of narcotics cannot be segregated from the "narcotic laws" of Louisiana and classified as some sort of general offense is buttressed by the fact that an attempt is but a lesser grade of the intended crime, La. Stat. Ann. 14:27, and by the fact that attempted possession of narcotics in Louisiana and in other jurisdictions which have adopted the Uniform Act. State v. Johnson, 228 La. 317, 82 So. 2d 24 (1955); State v. Broadnax, 216 La. 1003, 45 So. 2d 604 (1950); Simpson v. United States, 195 F. 2d 721, 13 Alaska 635 (9th Cir. 1952). Finally, we note that our conclusion accords with the avowed purpose of Congress "to facilitate more effective control of the international traffic in narcotic drugs, and to prevent the spread of drug addiction" in enacting 18 U.S.C. Sec. 1407.

In accordance with the foregoing opinion, it is the order of the Court that the convictions on Counts II and III be, and hereby are, vacated, annulled and set aside. It is the further order of the Court that Counts II and III be, and hereby are, dismissed. It is the further order of the Court that the defendant's motion to dismiss or "Motion in Arrest of Judgment" and "Motion for a New Trial" with respect to Count I be, and hereby is, denied. It is the further order of the Court that sentencing on Count I be, and hereby is, set for October 16, 1968, at 2:00 p.m.

APPENDIX B—OPINION OF FIFTH CIRCUIT COURT OF APPEALS

Before BROWN, Chief Judge, JONES and CARSWELL, Circuit Judges:

PER CURIAM: Randolph Erwin Rosenson was convicted of an unlawful departure from the United States in violation of 18 U.S.C.A. Sec. 1407. The circumstances giving rise to his conviction and the contentions made by him in the district court and in this Court on appeal are set forth in the opinions of the district court, **Rosenson v. United States of America,** 291 F. Supp. 874. No prejudicial error is disclosed by the record before us on appeal. The judgment and sentence of the district court is

AFFIRMED.

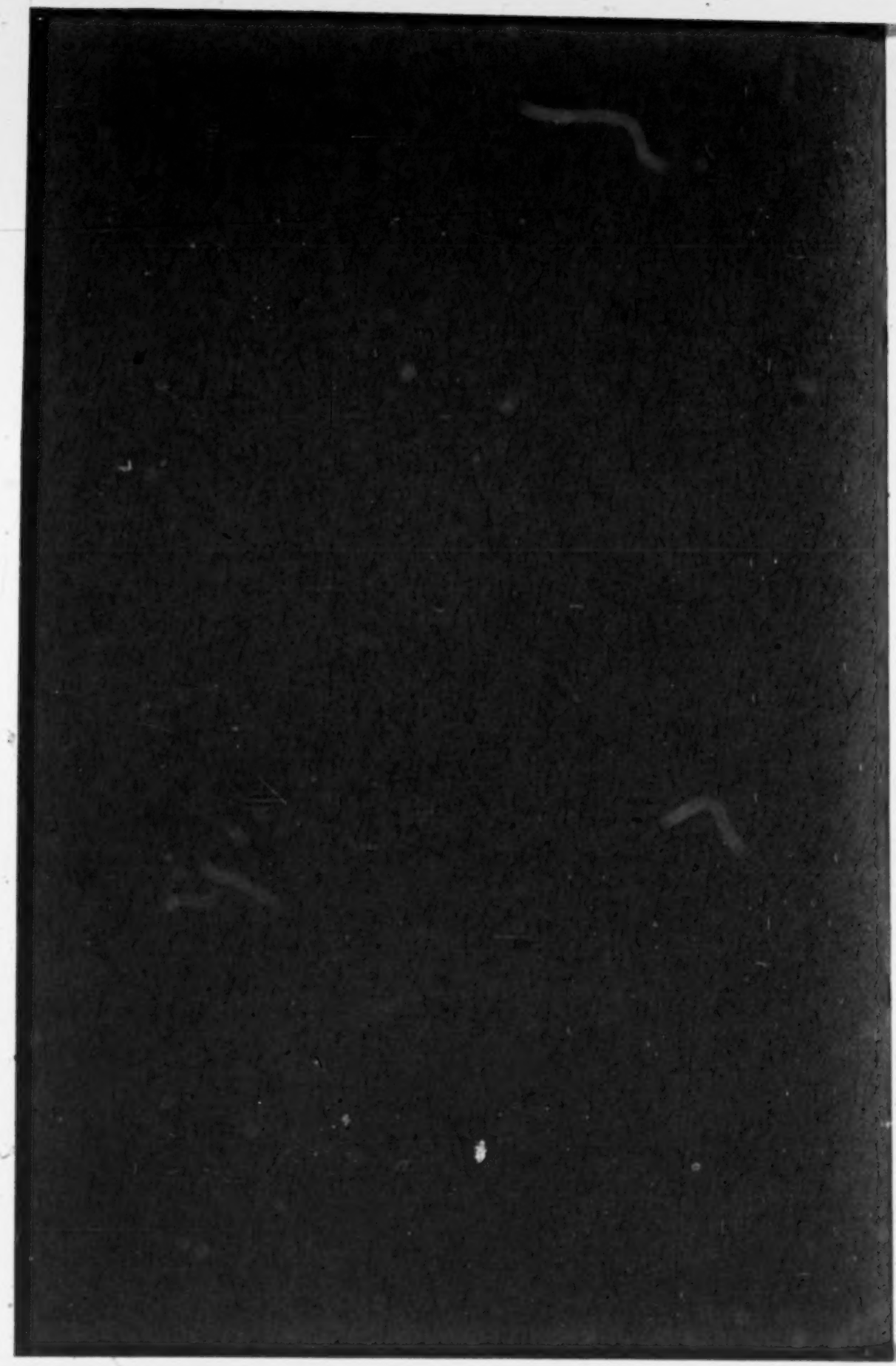
APPENDIX C—OPINION OF THE UNITED STATES COURT OF APPEAL

Before BROWN, Chief Judge, JONES and CARSWELL, Curcuit Judges

JUDGMENT: This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, AFFIRMED.

PER CURIAM: It is ordered that the petition for rehearing filed in the above entitled and numbered cause be and is hereby DENIED.



In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 964

RANDOLPH ERWIN ROSENSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. IX) is not yet reported. The opinion of the district court (Pet. App. I-VIII) is reported at 291 F. Supp. 874.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1969. A petition for rehearing was denied on November 18, 1969. The petition for a

writ of certiorari was filed on December 17, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was properly convicted under 18 U.S.C. 1407 of having failed, upon leaving the country, to register as a person convicted of a marihuana offense.

STATEMENT

Petitioner, a United States citizen, was convicted after a non-jury trial in the United States District Court for the Eastern District of Louisiana of departing the United States without registering as a person who had been convicted of a marihuana offense, in violation of 18 U.S.C. 1407.[1] He was sentenced to one year's imprisonment pursuant to 18 U.S.C. 4208(a)(2), *i.e.*, with eligibility for parole at such time as the Board of Parole sees fit (R. 254). The court of appeals affirmed.

The evidence showed that on December 28, 1965, petitioner departed New Orleans by commercial aircraft for Yucatan, Mexico. He returned on the same airline to New Orleans on January 1, 1966 (R. 67-69, 92-97). At the airport petitioner passed through

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[1] Petitioner was also convicted on two counts charging failure to register and return a certificate upon reentry, but, prior to sentencing, and after this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, the district court vacated these convictions on the ground that registration on reentry would have required petitioner to incriminate himself.

an area containing conspicuous signs which described the registration requirements under 18 U.S.C. 1407 to international passengers (R. 113-115). In January 1965 petitioner, with sale and possession of marihuana cigarettes, had pleaded guilty in a Louisiana state court to attempted possession of marihuana, and had received a suspended sentence of seven and a half years (R. 130). Petitioner did not register as one who had been convicted of a marihuana offense either when he left or upon his return to this country (R. 120-121). On his return, when questioned by a customs agent, petitioner said he had no narcotics convictions in his background (R. 122-123).

Petitioner testified on his own behalf that he was unaware of the registration requirement of 18 U.S.C. 1407 (R. 156). He denied having seen the signs posted at the airport (R. 173). He testified that he had permission to travel in the continental United States, that he assumed it was "all right to go to Mexico," and that soon after his return he reported the trip to his probation officer (R. 157-158). The probation officer confirmed the fact that petitioner had permission to travel and had reported on the trip to Mexico (R. 134-137).

ARGUMENT

1. 18 U.S.C. 1407 requires, *inter alia*, registration with customs officials upon departure from the United States by one who has been convicted of a "violation of any of the narcotic or marihuana laws of

* * * any State," the penalty for which is imprisonment for more than a year. Petitioner argues that his Louisiana conviction does not fit that definition because he was convicted under the general Louisiana attempt statute (La. Rev. Stat. 14:27), which makes attempt to commit a crime an offense punishable by half the penalty for the completed crime. His contention is fully answered by the opinion of the district court (Pet. App. VI-VII; 291 F. Supp. 874, 878-879). As the court pointed out, "without the crime of possession of narcotics there could be no crime of attempted possession of narcotics." Petitioner argues that the Louisiana attempt statute is so broad that it could be applied to situations of minimal complicity. Whether or not this is so, it would not alter the fact that the conviction would be for a violation of the laws relating to marihuana. That is all that is required to trigger the applicability of 18 U.S.C. 1407.

2. Registration upon leaving the country would in no respect have compelled petitioner to incriminate himself. Nothing in the registration as such was incriminating, for petitioner's Louisiana conviction was a matter of public record. Nor was the fact that petitioner was on his way to Mexico incriminating. Indeed, the requirement for registration upon departure as applied to one who has been convicted of a certain type of offense has consistently been upheld by the courts. *E.g.*, *Allen* v. *Meier*, 374 F. 2d 447 (C.A. 9), certiorari denied, 390 U.S. 972; see *Good* v. *United States*, 410 F. 2d 1217 (C.A. 5), pending on petition

for a writ of certiorari, No. 1019 Misc., this Term.[2]

Petitioner attempts to spell out a danger of incrimination by claiming that registration would have revealed a violation of probation. This was not, however, a real and substantial hazard. Petitioner had permission to travel. He himself testified that he therefore assumed it would be all right to go to Mexico—an assumption which proved correct since he reported the trip to his probation officer with no adverse results.[3]

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[2] In *United States* v. *Mancuso*, No. 358 (C.A. 2), decided January 20, 1970, the court of appeals thought that knowledge of or reasonable probability of knowledge of 18 U.S.C. 1407 was necessary for conviction. There the trial court specifically found that Mancuso, who had been convicted 17 years earlier of violating the narcotics laws, had no knowledge of the statute, and the court of appeals found that there was no reason to infer knowledge from the testimony as to signs at Kennedy airport. In the instant case, where petitioner's prior conviction of a narcotics offense preceded his failure to register by less than a year, the trial court did not consider that actual knowledge of or the reasonable probability of knowledge was a necessary element of proof in finding a violation of 18 U.S.C. 1407. There was, however, evidence in the record of the reasonable probability of knowledge, through conspicious signs posted at the airport. Thus *Mancuso*, even if correctly decided, is not in direct conflict with the decision here. In any event, the question probably has little significance for the future since the Controlled Dangerous Substances Act of 1969, as passed the Senate (see Daily Congressional Record, Vol. 116, No. 9, January 28, 1970, S § 815), would repeal 18 U.S.C. 1407.

[3] Petitioner's further suggestion (Pet. 10) that the courts below improperly "salvaged" that part of 18 U.S.C. 1407 relating to registration upon departure, as distinguished from reentry, is not well-founded. Contrary to petitioner's assertion,

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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Assistant Attorney General.

BEATRICE ROSENBERG,
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Attorneys.

FEBRUARY 1970.

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none of Section 1407 has been invalidated as unconstitutional. Rather, as in the *Marchetti-Grosso* situation, the privilege against self-incrimination might be thought to provide a defense to criminal prosecution for violation of the requirement of registration upon reentry. That hardly means that the statute, in part or in whole, has been invalidated on constitutional grounds. And even had the statute been partially invalidated, Congress has provided that the usual separability clause should apply. Act of July 18 ,1956, P.L. 728, Sec. 402, 70 Stat. 567, 576.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 964

RANDOLPH ERWIN ROSENSON
Petitioner

versus

UNITED STATES OF AMERICA
Respondent

PETITION FOR REHEARING FROM DENIAL OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN "RANDOLPH ERWIN ROSENSON VS. UNITED STATES OF AMERICA" No. 26,976 OF THE DOCKET OF SAID COURT.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Rosenson urges the following issues, not previously presented to this Court, but preserved by express reservation below, as a basis for rehearing of the denial of certiorari by this Court:

WHETHER THE TRIAL COURT ERRED IN DENYING A MOTION OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE BECAUSE OF FAILURE OF THE GOVERNMENT TO PROVE A PRIOR CONVICTION, AN ESSENTIAL ELEMENT OF GUILT UNDER 18 U.S.C. 1407.

Petitioner was being prosecuted for failure to register, as required by 18 U.S.C. 1407 of those previously convicted of State or Federal narcotics violations, upon leaving or returning to the United States.

This issue was presented to the Fifth Circuit Court of Appeals as our first assignment of error but has not been urged previously in this Court.

ARGUMENT

In order to sustain a conviction, of course, it was essential that the Government prove a previous narcotics conviction under the terms of the statute. In its case in chief, the sole basis whereby the Government sought to prove this conviction was apparently the intended offer of a certified copy of a judgment of conviction in the state court on January 11, 1965. This offer was made as follows toward the close of the Government's case: (R. 130)

> THE COURT: * * * What other documents do you have?
>
> MR. CONNICK: And G-8, your Honor, which is a certified copy of the conviction of one Randy Rosenson, who on the 11 day of January, 1965 withdrew a former plea of not guilty to the State of Louisiana, to an attempt to possess

narcotic drugs, to-wit, marijuana. This plea was accepted by the State. And it shows that the defendant was born on March 20, 1934, also, which coincides with the birth certificate.

"And this, we submit, is properly certified by the Clerk of the Criminal District Court for the Parish of Orleans, signed by JUDGE MALCOLM V. O'HARA, again properly certified by the Clerk of Court.

THE COURT: And that is the G-8?

MR. CONNICK: G-8.

THE COURT: Does that complete your offers?

MR. CONNICK: Yes, sir."

Immediately thereafter the defense made an objection to all of the offered documents, including, of course, the one just noted, the purported judgment of conviction, G-8. These objections were all overruled without discussion. (R. 131) Thereupon, the Government rested its case (R. 131)

Immediately thereafter the defense moved for an acquittal (R. 132)

Stating that there were serious constitutional questions involved, counsel for defendant then asked that he be permitted a delay in which to file a memorandum in support of this motion for acquittal so as to preserve the rights of defendant at this stage and it was agreed by the court and all parties that such leave would be granted but that the defendant would proceed to complete its case forthwith. (R. 132, 133)

THE FATAL DEFECT IN THE GOVERNMENT'S PROOF AT THIS STAGE WAS THAT, APPARENTLY THROUGH OVERSIGHT, THE GOVERNMENT HAD NOT ACTUALLY OFFERED A CERTIFIED COPY OF THE JUDGMENT OF CONVICTION AT ALL. INSTEAD, THE PURPORTED PROOF OF SUCH CONVICTION, JUDGMENT OR SENTENCE, G.8, (R. 130) CONSISTS OF *TWO* CERTIFICATES ATTESTING THE VALIDITY OF THE SIGNATURES AND STATUS OF THE STATE JUDGE AND CLERK OF COURT, BUT NO COPY WHATEVER OF THE PURPORTED JUDGMENT OR SENTENCE OR CONVICTION ITSELF. Presumably, the Government, through oversight simply offered two certified copies of the certificates attesting the signatures and status, instead of one copy of the judgment or sentence and one copy attesting the validity of the signatures thereon.

THE NET RESULT, OF COURSE WAS THAT THE RECORD WAS UTTERLY DEVOID OF A SINGLE SCRAP OF PAPER SHOWING THE STATE CONVICTION OR SENTENCE OR A SINGLE LINE OF TESTIMONY INDICATING SUCH CONVICTION OR SENTENCE.

True, after the motion for acquittal was denied, and after the defense was permitted to reserve the right to file a memorandum in support of the motion to dismiss as of that time, the defense did put on evidence of its own and the defendant himself, in answer to a question under cross, did admit that he had been given a suspended sentence under a plea of guilty to "attempted possession of marijuana" consisting of 11 cigarettes.

We concede that there is a sharp division of authority

in the various circuits as to whether or not, having made a motion for directed verdict of acquittal in such circumstances as that outlined above, a defendant is deemed to have waived his rights to complain of the sufficiency of the evidence by putting on evidence of his own.

WAIVER NOT FAVORED IN MODERN JURISPRUDENCE

We concede that, under the older cases the rule generally was that, after denial of a motion of acquittal at the close of the Government's case, if the defendant elected to put on evidence of his own, this might amount to a waiver of the status as it existed at the close of the Government's case. It is submitted, however, that this "waiver doctrine" is rapidly falling into disfavor. In his well known text on Federal practice, Wright, in Federal Practice and Procedure (Criminal) Vol. 2, Sec. 463 at page 247, states:

> "This waiver doctrine has come under heavy attack and there are signs that it may be crumbling. In several cases courts have been at pains *to consider the sufficiency of the evidence at the time the motion was made* after the government rested. In the District of Columbia Circuit the rule seems to have been abandoned entirely, and the court does not consider later evidence in determining whether the motion should have been granted at the close of the government's case. The criticism of the waiver doctrine rests on the view that it "seriously limits the right of the accused to have the prosecution prove a prima facie case before he is put to his defense" and that it "was imported from civil into criminal trials without considering the demands of our accusational system of criminal justice." (Emphasis added)

In support of the above text the author cites the following recent cases: *Cephus v. United States*, CA 1963, 324 F. 2d 893; *Moore v. United States*, CA 8, 375 F. 2d 877, *United States v. Godel*, CA 4th, 1966, 361 F. 2d 21, cert. den. 385 U.S. 838; *Franklin v. United States*, CA 1964, 330 F. 2d 205; *Belton v. United States*, CA 1967, 382 F. 2d 150; *Austin v. United States*, CA 1967, 382 F. 2d 129.

The above issue was specifically reserved before the Fifth Circuit, but not argued, counsel for petitioner stating that he elected not to consume his limited time in arguing this point because the Fifth Circuit, in recent decisions, had firmly taken the minority view, namely, that putting on of evidence by a defendant amounts to a waiver of any evidentiary deficiency in the Government's case where said evidence supplies what the Government's case lacked as of the making of the directed verdict of acquittal.

The Government, on this issue, took a double stance: First, it urged that the Fifth Circuit stand, as noted, made the point moot; Secondly, it called attention to a letter from the Clerk of Court attaching a photocopy of the missing sentence of conviction.

It is submitted that this highly informal method of correcting the record, without formal motion or order, but simply on a basis of friendly corresponuence between the United States Attorney and the Clerk, cannot be countenanced.

In conclusion on this point it is urged that:

(a) There is a sharp divergence of authority between the various Circuits; and

(b) Such divergence is a classic case for the exercise of this Court's supervisory jurisdiction.

NEW ISSUE—SCIENTER NOW REQUIRED

On Jan. 20, 1970 the Second Circuit Court of Appeals held, in *United States of America v. Mancuso* (6 Criminal Law Rep. 1078) that an essential element of this identical offense, i.e. failure to register under 18 U.S.C. 1407, is *guilty knowledge that one is required to register.*

The commentator in this as yet unreported case, summarizes the decision as follows:

"The trial judge had expressly found that the traveler had no knowledge of the requirement. The evidence at trial showed that there were no public notices of the requirement posted in any of the areas of Kennedy International Airport through which passengers are routed.

"Saving the constitutionality of the statute by reading into it a scienter requirement, a majority of the court suggests several ways in which the statute could be better enforced by the posting of notices and giving convicted drug offenders copies of the statute to read.

Judge Moore, who concurs in the result, would neither inform the Justice Department on enforcement methods nor "declare here when ignorance of the law is an excuse. (Page 2344)"

This point, lack of knowledge as to the requirement of registering, was urged in the lower Court at every stage of the proceedings, but, under the law as it then stood, it was rejected.

It is submitted that, since there is now at least some divergence between the various circuits, in view of Mancuso, supra, here again there now exists a classic case for exercise of this Court's supervisory jurisdiction.

CONCLUSION

Two new issues are thus presented to this Court in support of a plea for a rehearing of denial of certiorari. Aside from the valid technical reasons which urge the grant of such rehearing, moral grounds are persuasive that this be the case in which the current confusion should be swept away. Here we have the case of a wholly reformed marijuana user, who has not only reformed himself but had assisted the Government as an informer, being the victim of an entrapment which may well have been due to his refusal to go further in acting as an informer.

For the foregoing reasons we respectfully submit that a rehearing should be granted and that the judgment below should be reversed.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF COUNSEL

I certify that the foregoing petition for rehearing is presented in good faith and no for the purpose of delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

.....

OF COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I George M. Leppert, a member of the Bar of this Court in good standing and of counsel for petitioners in the above application for rehearing, do hereby certify that a copy of the foregoing petition for rehearing has been served upon the Solicitor General of the United States and upon the United States Attorney for the Eastern District of Louisiana, properly addressed and postage prepaid, on t he ..... day of March, 1970.

.....

GEORGE M. LEPPERT